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8  
9 IN THE UNITED STATES DISTRICT COURT  
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA

11		)	No. CR 07-0479 WHA
12		)	
13	UNITED STATES OF AMERICA,	)	
14	Plaintiff,	)	<b>DEBRA EDISON’S REPLY TO</b>
15	v.	)	<b>GOVERNMENT’S OPPOSITION TO</b>
16	DEBRA EDISON,	)	<b>MOTION TO QUASH</b>
17	Defendant.	)	Court: Honorable William H. Alsup
18		)	Date: January 15, 2008
		)	Time: 2:00 p.m.

19  
20 **I. INTRODUCTION**

21 The Government has failed to rebut Debra Edison’s assertion that her communications  
22 with Michael Thorman were private, confidential and protected from compelled disclosure by the  
23 attorney-client privilege. The Government is also unpersuasive in its argument that the attorney  
24 work-product doctrine does not extend to the mental thoughts, impressions, recollections and  
25 inquiries of Mr. Thorman with respect to the documents he produced to the government on June  
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21, 2007. Finally, the Government has failed to carry its burden of establishing that the crime-fraud exception applies to these otherwise confidential and privileged communications. Having failed to counter Mrs. Edison's assertion of privilege or establish the applicability of the crime-fraud exception, the Government should not be permitted to compel testimony from Mr. Thorman regarding his confidential and privileged communications with Debra Edison.

## II. ARGUMENT

### A. The Government has not persuasively rebutted Debra Edison's assertion that her communications with Michael Thorman were protected by the attorney-client privilege

In opposing Debra Edison's assertion of attorney-client privilege with respect to her communications with Michael Thorman, the Government devotes significant attention to "Mr. Thorman's perception of his relationship with Debra Edison" and argues that there is no "basis to believe that [Mr. Thorman] was acting as her attorney." Opposition, p. 7. However, it is not Mr. Thorman's perception that controls in making this determination, and he need not have been acting as Mrs. Edison's attorney for the attorney-client privilege to apply. Thus, his alleged perception cannot legally rebut the defense's argument.

It is well settled that the primary consideration in determining whether an attorney-client relationship existed is the intent of the client and whether she reasonably understood the conference to be confidential. *United States v. Dennis*, 843 F.2d 652, 657 (2nd Cir. 1988). *See also, Kevlik v. Goldstein*, 724 F.2d 844, 849 (1st Cir. 1984) ("The guiding principle in determining whether or nor there exists a privileged attorney-client relationship is the intent of the client.") The Government cannot rebut the fact that Mrs. Edison has introduced into the record a sufficient basis to conclude that she communicated openly with Michael Thorman with the belief that her statements were protected by the attorney-client privilege and the intent that their communications would remain confidential. *See*, First Declaration of Debra Edison in Support of Motion to Quash, ¶ 4.

1 Further, the government's "evidence" of Mr. Thorman's perceptions, namely the  
2 declaration of Agent Britton containing hearsay, was improperly obtained and should not be  
3 considered by this Court. In what appears to be improper behavior, the government interviewed  
4 Michael Thorman about his legal relationship and conversations with Debra Edison *after* Debra  
5 Edison had filed a motion to quash the grand jury subpoena to Mr. Thorman and *after* Debra  
6 Edison had asserted an attorney-client relationship with Mr. Thorman. Given that Debra Edison  
7 had asserted the privilege and this Court has not yet ruled on the issue, it was inappropriate for  
8 the government to interview Mr. Thorman about his relationship and the contents of some of his  
9 conversations with Debra Edison in order to support the argument it makes in its opposition  
10 brief. Further, it was inappropriate for the government to submit presumptively attorney-client  
11 privileged information in support of its opposition prior to any determination by the Court as to  
12 the applicability and extent of the privilege. *See, United States v. Chen*, 99 F.3d 1495, 1503 (9<sup>th</sup>  
13 Cir. 1996), holding in the context of the crime-fraud exception to the attorney-client privilege  
14 that "[t]he government cannot show the otherwise privileged material to the judge unless and  
15 until the judge has made this preliminary judgment [that the government has made a sufficient  
16 showing that the crime-fraud exception applies]." The defense requests that the Court make  
17 further inquiries to the government as to how it justifies this behavior, and that the Court  
18 consider imposing sanctions, including that Michael Thorman not be called as a grand jury  
19 witness.<sup>1</sup>

20 The government also devotes substantial energy to the "illogical" and "absurd" outcomes  
21 that can be imagined if the Court were to extend Mrs. Edison's personal expectation of  
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24 <sup>1</sup>The government bases its response to Debra Edison's assertion of privilege on its  
25 December 18, 2007 conversation with Michael Thorman. However, it offers no factual support  
26 or citation to the record to support its assertion that Michael Thorman did not represent any of  
Michael Edison's interests in the civil actions (Gov. Opp. at 7).

1 confidentiality to the spouses, heirs and casual acquaintances of criminal defendants *en masse*.<sup>2</sup>  
 2 It is true that an individual's expectation of confidentiality must be reasonable in order for the  
 3 attorney-client privilege to attach. *Griffith v. Davis*, 161 F.R.D. 687, 694 (C.D. California 1995).  
 4 However, the Government seeks to impute the knowledge, education and professional skepticism  
 5 of an experienced prosecutor to the subjective expectations of a layperson unexposed to Socratic  
 6 discourse and unfamiliar with the pages of *Wigmore On Evidence*. See, *United States v.*  
 7 *Moscony*, 927 F.2d 742, 752 (3<sup>rd</sup> Cir. 1991), quoting with approval a finding by the District Court  
 8 for the Eastern District of Pennsylvania that two witnesses alleged to have waived their attorney-  
 9 client privilege in a criminal RICO action were “unsophisticated lay persons who were not  
 10 advised by defense counsel or anyone else that the information they divulged [in written  
 11 affidavits provided to defense counsel] would not be confidential.”<sup>3</sup>

12 Debra Edison, as a non-attorney with limited formal education, was reasonable in her  
 13 expectation that she could communicate confidentially with an attorney retained by her own  
 14 husband without fear that her statements would be subpoenaed, disclosed, and used against her.  
 15 One of the many reasons that her belief was reasonable was that she faced the exact same  
 16 financial consequences as did her husband. In its extensive quoting of the letter that Michael

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18 <sup>2</sup>The government argues that this is illogical because it would also apply to children and  
 19 the like. It is simply incorrect that anyone else shares the same financial relationship as do  
 20 spouses – an expectation of an inheritance is not the equivalent of a current actual financial stake.  
 21 Further, the government argues that it would be “absurd” to think that any spouse’s conversations  
 22 with his or her spouse’s lawyer is privileged, but does not explain why. In fact, there is a legal  
 23 spousal privilege that encompasses an enormous number of communications, and if a spouse is  
 24 fully financially implicated in a lawsuit against his or her spouse *and* has an expectation of  
 25 privacy, then it would not be unreasonable for such a privilege to exist in other cases, which are  
 26 not before this Court in any event. Finally, the government has introduced no evidence  
 whatsoever, such as a pre-nuptial agreement, rebutting the defense’s position that Debra Edison  
 had a direct financial interest in the outcome of the cases against her husband.

<sup>3</sup>The relevant witnesses were employees of defendant Moscony who had been informed  
 and believed that they also were represented by Moscony’s defense attorney for purposes of the  
 grand jury investigation leading Moscony’s indictment.

1 Edison sent to Debra Edison that allegedly forms the basis for the fraud, the government  
2 overlooks the fact that Michael Edison refers to the attorneys and lawyers as “our attorney” (sic).  
3 *See, e.g.*, attachment to Declaration of Mandy Britton, ME006988.

4 Finally, Debra Edison asks that the Court make further inquiry into the government’s  
5 reasons for summoning Mr. Thorman before the grand jury as opposed to presenting Agent  
6 Britton’s testimony about her conversations with Mr. Thorman to the grand jury. The defense  
7 asks that the Court inquire of the government whether any other fact witnesses (such as the  
8 alleged victim in the case against Mr. Edison, Jean Phlegher) have been compelled to testify  
9 before the grand jury, and if not, why Mr. Thorman is the only one. Undersigned counsel  
10 believes that Michael Thorman will not dispute that at least at one point, he had an attorney-  
11 client relationship with Debra Edison, and so at the very least, the government is compelling  
12 Michael Thorman to violate his duty of loyalty to his one-time client. If other fact witnesses  
13 have not been called before the grand jury and if information obtained from them has instead  
14 been presented to the grand jury through the case agent, this raises an inference that the  
15 government is improperly interfering with Debra Edison’s attorney-client relationship.

16 **B. The attorney work-product doctrine extends to Mr. Thorman’s**  
17 **communications with Debra Edison**

18 As noted by the Government, Mrs. Edison does not assert that the documents produced  
19 by Mr. Thorman to the Government constitute attorney work product. However, the fact that the  
20 documents themselves are not work-product does nothing to strip the protection of the work-  
21 product doctrine from Mr. Thorman’s inquiry into the facts and circumstances surrounding their  
22 production. The work-product privilege safeguards “ ‘written statements, private memoranda  
23 and personal recollections prepared or formed by an adverse party’s counsel in the course of his  
24 legal duties.’ ” *United States v. Reyes*, 239 F.R.D. 591, 598 (N.D. Cal 2006), quoting *Hickman v.*  
25 *Taylor*, 329 U.S. 495, 510 (1947). The protections of the work-product doctrine extend not only  
26 to documents and memoranda but also to mental impressions, personal beliefs, and countless

1 other tangible and intangible efforts and conclusions of counsel. *See, Hickman*, at 511.

2 Thus, despite the Government's focus on the work-product doctrine's protection of  
3 "documents and tangible things," it is clear that the protections of the attorney work-product  
4 doctrine apply to Michael Thorman's inquiry into the origin of the documents produced by Mr.  
5 Thorman to the Government and to any statements made by Debra Edison in furtherance of that  
6 inquiry. As articulated by the Supreme Court in *Hickman*:

7 [A]s to oral statements made by witness [to counsel], whether presently in the form of his  
8 mental impressions or memoranda, we do not believe that any showing of necessity can  
9 be made under the circumstances of this case to justify production. Under ordinary  
conditions, forcing an attorney to repeat or write out all that witnesses have told him and  
to deliver the account to his adversary gives rise to grave dangers of inaccuracy and  
untrustworthiness.

10 329 U.S. 495, 512-513.

11 Further, Mr. Thorman's unilateral provision of the documents to the Government in no  
12 way effectuated a waiver by Mrs. Edison of the work-product privilege. Generally speaking, "the  
13 attorney-client privilege is waived upon the voluntary disclosure of protected information by a  
14 client, or by an attorney at the behest of a client." *U.S. v. Reyes*, 239 F.R.D. 591, at 598, citing  
15 *Weil v. Investment/Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 24 (9<sup>th</sup> Cir. 1981). Mrs.  
16 Edison has asserted that at no time did she explicitly or implicitly waive any privileges with  
17 respect to her communications with Mr. Thorman, and the Government has introduced no facts  
18 into the record to contradict her.

19 In fact, having grown impatient after intercepting Michael Edison's April 3, 2007 letter to  
20 his wife, the government purposefully and specifically elicited production by Michael Thorman  
21 of the referenced documents on or about June 8, 2007. *See*, Exhibit A to the Declaration of Eric  
22 M. Hairston, attached hereto. Nothing in the record indicates that either of the Edisons were  
23 aware that Mr. Thorman agreed to produce the documents in question, much less instructed that  
24 such production take place. The grand jury subpoena seeking to compel testimony from Michael  
25 Thorman regarding his mental thoughts, impressions, recollections and other work product  
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1 should therefore be quashed.

2 **C. The Government has not met its burden of establishing that the crime-fraud**  
 3 **exception applies to confidential communications between Michael Thorman**  
 4 **and Debra Edison**

5 Despite the Government's argument, neither the crime-fraud exception in general nor its  
 6 application to the facts of this case can be described as "straightforward." The Ninth Circuit  
 7 engaged in a recent and thorough discussion of the crime-fraud exception to the attorney-client  
 8 privilege in *In re Napster, Inc. Copyright Litigation*, 479 F.3d 1078 (9<sup>th</sup> Cir. 2007). There, the  
 9 Court articulated a two-part test for a party seeking to vitiate the attorney-client privilege under  
 10 the crime-fraud exception. First, the party must show that "the client was engaged in or planning  
 11 a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme."  
 12 Second, the party must demonstrate that the attorney-client communications for which  
 13 production is sought are "sufficiently related to" and were made "in furtherance of [the] intended,  
 14 or present, continuing illegality." *Napster*, at 1090, quoting *In re Grand Jury Proceedings*, 87  
 15 F.3d 377, at 381 (9<sup>th</sup> Cir. 1996). In order to satisfy this test, the Government must submit  
 16 "evidence that if believed by the jury would establish the elements of an ongoing violation."  
 17 *United States v. Chen*, 99 F.3d 1495, 1503. Mere allegations or suspicion by the Government are  
 18 insufficient to establish the applicability of the crime-fraud exception. Rather, the burden of  
 19 proof that the Government must meet is one of "reasonable cause." Reasonable cause, as defined  
 20 by the Ninth Circuit, is "more than suspicion but less than a preponderance of evidence." *Id.*

21 Here, the Government has presented no facts establishing reasonable cause to believe that  
 22 any confidential communications between Debra Edison and Michael Thorman were made in  
 23 furtherance of intended or continuing obstruction of justice.<sup>4</sup> The statute under which Mrs.  
 24 Edison was charged imposes penalties for knowing alteration, destruction, mutilation or  
 25 falsification (among other things) of any record, document or tangible object "*with the intent to*

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26 <sup>4</sup>Or past obstruction of justice, for that matter.

1 impede, obstruct, or influence the investigation or proper administration of any matter within the  
2 jurisdiction of any department or agency of the United States...” 18 U.S.C. 1519 (emphasis  
3 added). The Government has not set forth any facts giving rise to reasonable cause to conclude  
4 that Mrs. Edison took any action with respect to the documents in question with the intent to  
5 obstruct the Government’s investigation of her husband.

6 As noted above, it appears that Mr. Thorman provided the documents in question in  
7 response to a specific request from the Government, who since April 3, 2007 had anticipated an  
8 act of obstruction that never materialized. The government’s brief omits the fact that the  
9 government contacted Mr. Thorman and asked him to give it any documents that matched the  
10 description of the fraudulent documents it hoped the defendants had created. It seems both  
11 illogical and contrary to the interests of justice that the Government would now seek to base the  
12 crime-fraud exception, and potentially a superceding indictment, on Mr. Thorman’s  
13 accommodation of their own request.

14 Further, the Government has failed to demonstrate how any communications between  
15 Mrs. Edison and Mr. Thorman regarding the documents were in furtherance of *intended or*  
16 *continuing* obstruction. It is well established that attorney-client communications concerning  
17 past or completed crimes do not come within the crime-fraud exception. *In re Grand Jury*  
18 *Subpoena 92-1*, 31 F.3d 826, 831 (9<sup>th</sup> Cir. 1994). The Government’s opposition does not clearly  
19 articulate a point in time when Mrs. Edison’s alleged crime of obstruction of justice was  
20 completed. If it is the Government’s position that the obstruction was effectuated by Mr.  
21 Thorman’s June 21, 2007 production of documents, counsel for Mrs. Edison submits that the  
22 crime-fraud exception is inapplicable due to the Government’s failure to demonstrate any intent,  
23 or even knowledge, on the part of Mrs. Edison in connection with that production. If the  
24 Government alleges that the crime of obstruction was completed at some point prior to the June  
25 21, 2007 production, then any subsequent conversation between Mr. Thorman and Mrs. Edison  
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1 regarding the origin and nature of the documents in question necessarily falls outside the scope of  
2 the crime-fraud exception. The Government has failed to demonstrate that the crime-fraud  
3 exception applies to otherwise privileged and confidential communications between Debra  
4 Edison and Michael Thorman, and the subpoena calling for testimony regarding such  
5 communications should therefore be quashed.

6 **III. CONCLUSION**

7 The Government has failed to persuasively rebut Debra Edison's assertion that her  
8 confidential communications with Michael Thorman were protected by the attorney-client  
9 privilege and attorney work-product doctrine. Further, the Government has failed to establish  
10 that the crime-fraud exception applies to these otherwise privileged communications. Having  
11 failed to counter Mrs. Edison's assertion of privilege or carry its burden regarding the crime-  
12 fraud exception, the Government should not be permitted to compel testimony from Mr.  
13 Thorman regarding his confidential communications with Mrs. Edison. The subpoena calling for  
14 Michael Thorman to testify before the grand jury should therefore be quashed.

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18 Dated: January 8, 2008

Respectfully submitted,

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21 /S/

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